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ABSTRACT

This pamphlet offers college and university administrators and attorneys a road map of the legal issues surrounding the dismissal of students with mental disabilities (including psychiatric disorders and learning disabilities) as well as practical guidance on how best to uphold the school's disciplinary and academic standards while keeping within the current law. The pamphlet updates and expands upon an earlier pamphlet. The first section provides an overview of applicable federal law, explaining the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973. It focuses on: what these statutes require, scope of the coverage, how a disability is defined under these laws, who are otherwise qualified individuals, and what constitutes reasonable accommodation. The second section discusses dismissal of students with mental disabilities, focusing on disciplinary and behavior-related dismissals and dismissals for failure to meet academic requirements. The third section discusses the influence of pre-higher education protections on the expectations of postsecondary students. The pamphlet concludes with answers to commonly-asked questions (e.g., mental conditions not covered by these statutes and commonly made mistakes in managing dismissal situations involving students with mental disabilities). (SM)

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THE PUBLICATION SERIES

The Dismissal of Students with Mental Disabilities

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The Dismissal of Students with Mental Disabilities

Introduction

For many years, administrators, campus attorneys and other officials at colleges and universities across America have faced the problem of how to handle, both practically and lawfully, the dismissal of students with various types of mental disorders. With the passage of the Americans With Disabilities Act of 1990, this issue has become increasingly visible and pressing. This pamphlet serves as a guide to college and university administrators and attorneys by providing a "road map" of the legal issues surrounding the dismissal of students with mental disabilities (including psychiatric disorders and learning disabilities) and by offering practical guidance on how best to uphold the school's disciplinary and academic standards, while keeping within the bounds and spirit of the current law.

This publication updates and expands upon an earlier pamphlet on the same subject matter, written by Gary Pavela and published by NACUA prior to the enactment of the ADA.[1]

OVERVIEW OF APPLICABLE FEDERAL LAW

There are two federal laws prohibiting discrimination against students or prospective students with disabilities – the Americans With Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973. Since both are similar in their substantive requirements, unless specifically noted, they will be discussed as one throughout this pamphlet.

At the outset, it is important to understand that these two statutes apply to all aspects of a college's or university's operations: its academic programs, co-and extracurricular activities, admissions and placement activities, student services, facilities, and so forth.

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1. *See* Gary Pavela, *The Dismissal of Students with Mental Disorders* (National Association of College and University Attorneys publication series, 1990).

It is also important to point out that many states (and some large municipalities) have themselves enacted laws prohibiting discrimination against students with disabilities. Although it is beyond the scope of this publication to identify and discuss each of these state and local laws, readers would be well advised to become familiar with those that affect their institution.

What Do These Statutes Require?

There are two fundamental mandates under the ADA and Section 504: (i) a non-discrimination mandate; and (ii) a reasonable accommodation mandate.

The non-discrimination mandate prohibits a college or university from discriminating against a student or prospective student solely because he or she has a disability covered by these laws. For example, it would be unlawful discrimination to dismiss an *otherwise qualified* student solely because of the student's disability status.

The "reasonable accommodation" mandate goes beyond non-discrimination, and imposes affirmative obligations on the college or university to provide adjustments, modifications, auxiliary aids and services, and other accommodations needed by an otherwise qualified disabled student to enable that student to participate in the full range of the school's programs and activities – as long as those accommodations do not impose an *undue burden* on the institution.

Scope of Coverage

Section 504 provides, in relevant part:

> No otherwise qualified individual with a disability... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....[2]

The term "program or activity" means all of the operations of any "college, university, or other postsecondary institution, or a public system of higher education" that receives federal financial assistance. 29 U.S.C. § 794(b)(2)(A). In *Grove City College v. Bell*, 465 U.S. 555 (1984), the United States Supreme Court held that a pri-

2. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794(a) (1999).

vate college was a "recipient" of federal financial assistance even though the college did not directly receive any federal funds, because some of its students received basic educational opportunity grants and used those grants to pay for their education. In essence, the operations of virtually every college or university in the nation are covered by Section 504.[3]

Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act and similarly states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[4]

The term "public entity" encompasses public colleges and universities.[5]

Finally, Title III of the ADA, which applies to private colleges and universities,[6] sets forth as a general rule that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[7]

What Is a "Disability" Under These Laws?

The ADA defines a disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment."[8]

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3. In the *Grove City College* case, the Supreme Court had also held that the receipt of federal financial assistance by one of a school's programs did not subject the entire institution to coverage. Congress, however, overturned that aspect of the *Grove City* case when it enacted the Civil Rights Restoration Act in 1986. Now, receipt of any federal financial assistance subjects the entire institution to coverage.

4. Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12132 (1995).

5. *See id.* § 12131(1) ("The term 'public entity' means – any department, agency,.... or other instrumentality of a State...."); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999) ("Title II prohibits discrimination by state and local agencies, which includes publicly funded institutions of higher education.").

6. *See id.* § 12181(7)(J) (listing undergraduate or postgraduate private schools or other places of education as "private entities...considered public accommodations" for purposes of Title III of the ADA). Entities controlled by religious organizations are excepted from Title III. *See id.* § 12187 (exempting "religious organizations or entities controlled by religious organizations" from the provisions of Title III).

7. 42 U.S.C. § 12182(a).

8. 42 U.S.C. § 12102(2) (emphasis added).

Section 504's definition is nearly identical.[9]

Mental impairments include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[10] Among current or prospective students, colleges and universities are most likely to encounter learning disabilities such as dyslexia and attention deficit disorder,[11] as well as various psychiatric disorders, such as schizophrenia, bipolar disorder, and post-traumatic stress disorder.[12] Such impairments fall within the definition of a covered "disability" if they substantially limit one or more of a student's "major life activities." Under both the ADA and Section 504, "learning" is considered a "major life activity."[13]

In a trio of decisions issued in June 1999,[14] the Supreme Court offered valuable additional guidance regarding what constitutes a "disability" under the ADA. Most notably, the Court concluded that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."[15] Specifically, "if a person is taking measures to correct or mitigate a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."[16] In the *Sutton* case, for example, the Supreme Court upheld an appeals court decision that two sisters with 20/200 vision were not "disabled" for

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9. *See* 29 U.S.C. § 705(20)(B).

10. 34 C.F.R. § 104.3(j)(2)(ii)(B); 28 C.F.R. § 35.104 (defining disability).

11. *See, e.g., Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991) (dyslexia); *Kaltenberger v. Ohio College of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (attention deficit disorder).

12. *See, e.g., Wood v. President & Trustees of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992) (schizophrenia); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155 (5th Cir. 1996) (bipolar disorder); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850 (D.N.H. 1995) (post-traumatic stress disorder).

13. *See* 28 C.F.R. § 35.104; 34 C.F.R. § 104.3(j)(2)(ii). Other major life activities include, without limitation, caring for one's self, walking, seeing, hearing, speaking, breathing, and performing manual tasks.

14. *See Murphy v. United Parcel Serv., Inc.*, 119 S. Ct. 2133 (1999); *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).

15. *Sutton*, 119 S. Ct. at 2143.

16. *Id.* at 2146.

purposes of federal law where their visual acuity was 20/20 with corrective lenses.[17]

Although the June 1999 Supreme Court cases did not specifically involve individuals with mental disorders, the Court's holdings regarding physical impairments apply equally to physical and mental impairments. Thus, when evaluating whether a student suffers from a covered mental disability, a college or university must take into account both the positive and negative effects of any mitigating or corrective measures taken in relation to the student's condition in determining whether the student is substantially limited in one or more major life activities. For example, a student suffering from bipolar disorder or schizophrenia might not meet the definition of "disabled" under the ADA if the student takes medication that effectively controls the symptoms of the condition such that the student is able to participate in life's major activities without substantial limitation.[18] Conversely, the negative side effects caused by mitigating measures taken to treat an impairment may render a student disabled under the federal laws who might not have been considered disabled without regard to the corrective measure.[19]

In conjunction with its discussion regarding corrective or mitigating measures, the Supreme Court emphasized that whether a person has a disability under the ADA is an "individualized inquiry."[20] Thus, a college or university must focus on each individual's actual condition rather than on generalizations about how an

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17. *See Sutton*, 119 S. Ct. at 2149; *see also Murphy*, 119 S. Ct. at 2137 (affirming conclusion that individual with hypertension was not disabled where, when medicated, his high blood pressure did not substantially limit him in any major life activity).

18. *See Sutton*, 119 S. Ct. at 2146-47 ("A person whose physical *or mental* impairment is corrected by medication or other measures does not have an impairment that presently substantially limits a major life activity." (emphasis added)). The same analysis may also apply to a student with a learning disability who has demonstrated an ability to overcome the impairment through some sort of mitigating measure(s). *See, e.g., McGuinness v. University of New Mexico Sch. of Med.*, 170 F.3d 974, 979 (10th Cir. 1998) ("Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety.").

19. *See Sutton*, 119 S. Ct. at 2147 (suggesting that evaluators should consider any negative side effects suffered by an individual resulting from the use of mitigating measures and citing as an example a study noting that antipsychotic drugs can cause a variety of adverse effects).

20. *See id.*; *see also Albertsons, Inc.*, 119 S. Ct. at 2169 (re-emphasizing the need to "determine the existence of disabilities on a case-by-case basis").

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impairment usually affects a person. Further, the use of a corrective or mitigating measure does not in itself exclude an individual from having a covered "disability."[21]

Individual learning or behavior types, academic problems, and learning differences, in and of themselves, generally are not considered covered disabilities under either the ADA or Section 504.[22] Further, the definition of "disability" specifically excludes certain conditions such as transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, kleptomania, pyromania or psychoactive substance use disorders resulting from current illegal drug use.[23]

Who Is an Otherwise Qualified Individual?

An otherwise qualified individual is a person who is qualified for a school's programs or activities despite the disability.[24] In the postsecondary education context, an individual is qualified for a program if, with or without reasonable accommodation, the individual "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."[25]

Neither the ADA nor Section 504 requires an educational institution to disregard an individual's disability when making decisions about

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21. *See Sutton*, 119 S.Ct. at 2149 ("The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity.").

22. *See, e.g., McGuinness*, 170 F.3d at 980 (concluding that "an impairment limited to specific stressful situations," such as a student's test anxiety triggered only by mathematics and chemistry exams, was not a disability under Section 504); *Duda v. Board of Educ. of Franklin Park Public Sch. Dist.*, 133 F.3d 1054 (7th Cir. 1998) (noting that "mere temperament and irritability" are not impairments covered by the ADA); *Linson v. Trustees of Univ. of Pa.*, 8 Nat'l Disability L. Rep. ¶ 299 (E.D. Pa. 1996) ("[P]oor judgment, irresponsible behavior and poor impulse control do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity." (quoting *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989))).

23. 28 C.F.R. § 35.104.

24. *See, e.g., Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979).

25. 34 C.F.R. 104.3(k)(3); *see also Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 821 (9th Cir. 1999) (discussing the "otherwise qualified" standard). The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question. 34 C.F.R. pt. 104, App. A.

that individual's qualifications to participate in the school's academic program or other activities. Rather, in determining whether an individual is "otherwise qualified," campus administrators may take into account the limitations arising from the disability, provided that those limitations are relevant to the reasonable qualifications involved.[26] Mere possession of a disability, however, "is not a permissible ground for assuming an inability to function in a particular context."[27]

To ensure compliance with the federal laws, the evaluation of whether an individual is otherwise qualified should include an inquiry into reasonable accommodations.[28] In particular, in determining whether an individual is otherwise qualified, colleges and universities should ask themselves whether the individual could meet the academic standards with or without reasonable accommodation. If the answer is "yes," then the individual with a disability is otherwise qualified.

Likewise, an institution must determine an individual's qualifications on a case-by-case basis.[29] It may not rely merely on the fact that the student has a mental disorder or had one in the past,[30] nor may it act merely on the assumption that the student, because of his or her disability, will be unable to meet the program or activity's requirements. Instead, the college or university must base its decision on fact-specific evidence that the particular individual at issue cannot meet the essential requirements of the program or activity. In doing so, the institution must make a conscientious effort to consider all relevant factors, including possible modifications it could make to its programs to accommodate

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26. *See, e.g., Davis*, 442 U.S. at 405-06; *Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981).

27. *Davis*, 442 U.S. at 405.

28. *See, e.g., Doherty v. Southern College of Optometry*, 862 F.2d 570, 574 (6th Cir. 1988) (noting that the "inquiry into reasonable accommodation is one aspect of the 'otherwise qualified' analysis").

29. *See, e.g., Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (holding that a decision to deny an individual admission was impermissibly based on generalizations about individuals with multiple sclerosis); *see also Sutton*, 119 S. Ct. at 2147; *Albertsons, Inc.*, 119 S. Ct. at 2169.

30. *See, e.g., Doe v. New York Univ.*, 666 F.2d 761, 779 n.10 (2d Cir. 1981) (cautioning that "[c]are must be exercised by schools... not to permit prior mental illness to be routinely regarded as a disqualification").

the student, and the past and/or potential effects of such accommodations on the student's performance.[31]

What Is Reasonable Accommodation?

Reasonable accommodations include any adjustments, modifications, auxiliary aids or services necessary to afford an individual with a disability an equal opportunity to "obtain the same result,... gain the same benefit, or... reach the same level of achievement" as non-disabled individuals.[32] The law, however, requires only that the institution make reasonable accommodations, not the best accommodations, and those accommodations need only guarantee equal opportunity, not equal results.

The question of what particular type of adjustment, modification, or auxiliary aid or service might be required in any given situation will vary, depending upon the individual circumstances of the applicant or student. Based upon an assessment of those circumstances, it might be deemed reasonable to provide adjustments or accommodations such as (but not limited to) the following:

- granting extra time to complete an assignment or examination;
- providing an alternative format for taking an examination (for example, permitting an oral examination rather than a written one);
- permitting the student to take an examination in an alternative location;
- providing auxiliary aids and services, such as note-takers, readers, taped texts, large print materials, etc.;
- removing barriers to physical access to a classroom or other facility of the school.

Educational institutions need not provide accommodations that will result in an "undue financial and administrative burden" or that will

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31. *See, e.g., Wong*, 192 F.3d at 825 (holding that the university failed to show that it conscientiously considered all pertinent and appropriate information in making its decision to dismiss a learning disabled student from the school of medicine for failure to meet the school's academic standards).

32. 34 C.F.R. § 104.4 (b)(vii)(2).

fundamentally alter the nature of the service, program or activity provided.[33] The concept of "undue burden" is generally a financially-driven one. Although the law still is being developed, the approach often taken by advocates and by the government is to focus on the overall corporate budget of an institution in evaluating whether a particular accommodation for an individual applicant or student would constitute an "undue burden" on the institution as opposed to a "reasonable accommodation."

There are, however, a few areas where the law delineates fairly clearly whether something is a reasonable accommodation versus an undue burden. First, the government and the courts generally have acknowledged that it is an *undue burden* to require a school to make fundamental alterations to or compromise the academic integrity of its educational programs. Thus, for example, a school is not required to "waive" a required course or series of courses that a disabled student is unable to complete if those courses can be shown to be essential to the program of instruction being pursued. Likewise, a school is not required to lower its standards of academic performance or accomplishment.

Secondly, a school need not tolerate disruptive behavior by a student with a covered disability. That, too, generally would constitute an undue burden. If the student asserts that his/her behavior is the result of a disability (for example, bipolar disorder or schizophrenia), that does not mean the school must accept the behavior in all cases. Student misbehavior should be dealt with by means of the school's regular discipline processes. Even if the student cannot control his/her behavior due to a disability, the school can still require the student to meet its minimum behavioral standards.

It is also clear that the law does not in all cases require a school to accept the precise accommodation requested by a student. A school only has to offer a *reasonable* accommodation – not the *best* accommodation or the accommodation that the student prefers.

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33. 28 C.F.R. § 35.150. See 42 U.S.C. § 12111(10) for a statutory definition of "undue hardship" and the factors used to determine its existence in regard to reasonable accommodations in Title I of the ADA.

In addition, there is no duty to provide an accommodation that is not *required* by an individual's disability. Any requested accommodation should be directly related to the individual student's functional limitations resulting from that student's disability.

Finally, a school has no duty to accommodate a student where the school has no knowledge of the student's disability. Rather, the duty to accommodate is triggered only where the student's disability is obvious, where the student notifies the school of his/her disability, or where the school otherwise should have been aware of the disability.[34]

DISMISSAL OF STUDENTS WITH MENTAL DISABILITIES

Disciplinary and Behavior-Related Dismissals

Two of the most common situations in which administrators face the difficult question of whether dismissal of a student with a mental disability is appropriate are: (i) situations where the student with a mental disability engages in behavior that threatens the safety or performance of others on campus; and (ii) situations where a student with a mental disability commits a violation of school policy or the code of conduct that, if committed by a non-disabled student, would ordinarily lead to that student's dismissal.

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34. *See, e.g., Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992) (noting that "for a...school to be liable under the Rehabilitation Act [it] must know or be reasonably expected to know of [a student's] handicap," and that "[a] relevant aspect of this inquiry is whether the student ever put the...school on notice of his handicap by making a sufficiently direct and specific request for special accommodations." [citations omitted] (quoting *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1381 (3d Cir. 1991))); *Leacock v. Temple Univ. School of Med.*, Civ. Action No. 97- 7850, 1998 U.S. Dist. Lexis, at * 10 (E.D. Pa. Nov. 25, 1998) (holding that an institution cannot be liable under Section 504 for failure to accommodate a learning disabled student if the school did not know, or have reason to know, of the student's disability, at the time it notified her she was dismissed); *Goodwin v. Keuka College*, 929 F. Supp. 90, 93 (W.D.N.Y. 1995) ("The school can only be charged with making its decision based on the information available to it at that time."); *Highline Community College*, 5 Nat'l. Disability L. Rep. ¶ 165 (Off. Civ. Rts. 1994) (stating the school was not liable for failure to accommodate a student where the student failed to notify the college of his disability in accordance with the procedure set forth in the student's admissions materials); *see also Valencia Community College*, 4 Nat'l. Disability L. Rep. ¶ 236 (Off. Civ. Rts. 1993) (emphasizing that a student must disclose her/his disability prior to requesting that the school provide reasonable accommodations).

Although the proper outcome in each individual case depends on its particular facts, the law is clear that, even though a student may have a mental disability within the meaning of the ADA and/or Section 504, colleges and universities are not required to tolerate or excuse disruptive behavior caused by manifestations of that mental disability or by behavior that otherwise violates school policy. To do so may be an "undue hardship." Moreover, if the student fails to meet the "otherwise qualified" standard, the school may take disciplinary action without violating the ADA or Section 504. As illustrated below, the federal disability laws often will not preclude a college or university from properly ordering the suspension or dismissal of a student as a result of misconduct or otherwise egregious behavior.

In one of the leading cases in this area, *Doe v. New York University*,[35] the United States Court of Appeals for the Second Circuit declined to force the New York University's School of Medicine to readmit a former medical student with a history of serious psychiatric and mental disorders, where the school determined that the student posed an unacceptable risk to faculty, fellow students, and patients. In refusing to issue a preliminary injunction requiring the school to readmit the student pending the outcome of the litigation, the court held that the student had failed to show a likelihood of success in proving that she was "otherwise qualified" for acceptance as a medical student or to engage in the practice of medicine. The manifestations of the student's mental disorder included numerous self-destructive acts and attacks on others. Furthermore, the school had evidence suggesting there was a substantial risk that the student's mental disturbances would recur, resulting in further behavior harmful to herself and others.

In reaching its decision, the court stressed that an institution "need not dispense with reasonable precautions or requirements that it normally would impose for safe participation by students, doctors and patients in its activities."[36] The court noted that NYU was "of necessity concerned with the safety of other students, faculty

35. 666 F.2d 761 (2d Cir. 1981).

36. *Id.* at 775.

and patients to whom Doe would be exposed, since this could adversely affect them as well as the success and reputation of its Medical School activities."[37] Since the student's mental impairment was directly relevant to her ability to function as a student and as a doctor, to get along with others, and to withstand the stress of the academic program, the school was entitled "to be advised of and take into account her mental impairment in determining whether the student was qualified."[38]

The holding in *Doe* may be limited by the fact that the court found the student had a "serious" mental disorder likely to "continue through most of... her adult life."[39] In addition, the case may not be fully applicable to undergraduate or graduate programs other than medical school since the court concluded that there were "exceptional stresses" associated with medical training.[40] A person suffering from a mental disorder similar to the student in *Doe* might be deemed capable of meeting institutional requirements in other academic programs, including other graduate programs.[41]

Notwithstanding the possible limitations set forth above and the fact that *Doe* technically was a "readmission" case rather than a "dismissal" case, *Doe* supports the general conclusion that the ADA and Section 504 allow an institution to take into account the likely recurrence of harmful behavior by a person suffering from a mental disability in making decisions about whether that person should continue as a student.[42] Indeed, the Department of Education's Office for Civil Rights ("OCR") has applied principles similar to those expressed in *Doe* to situations involving the dismissal of students with mental disabilities.

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37. *Id.* at 777.

38. *Id.*

39. *Id.* at 768.

40. *See id.* at 778.

41. *See* Pavela, *supra* note 1, at 5 (discussing *Doe*'s limitations).

42. *See id.*; *see also* 43 Op. Att'y Gen. 12, at 2 (1977) (affirming that Section 504 presumably would not require an institution to make unrealistic accommodations where the behavioral manifestations of a person's disability would cause that person's participation in an activity to be unduly disruptive to others), *cited by* Pavela, *supra* note 1, at 3.

For example, in *Dixie College*,[43] the OCR held that a college did not violate Section 504 when it expelled a student where it had evidence that the student had stalked and harassed a professor. The OCR explained that the college's Student Affairs Committee did not expel the student on the basis of a perceived mental disability (as the student had argued), but "rather on its determination that the evidence...demonstrated that the complainant exhibited threatening behavior and that there was a 'genuine and immediate fear of harm to faculty and students.'"[44]

Similarly, in *North Central Technical College*,[45] the OCR rejected a nursing student's claim that she was dismissed based on a perceived mental disability where the student had become verbally abusive during a meeting with faculty, had accused the faculty of not doing their jobs, and had walked out of the meeting slamming the door behind her. After this incident, the college had advised the student she would have to provide the school with written evidence that she was receiving counseling for her stress-related problems before the school would permit her to participate in additional clinical experiences. The student never provided the requested documentation and was subsequently dismissed after she failed two courses because of her lack of clinical experience.

The OCR concluded that the college did not base its decision on a perceived mental disability, but rather on the student's behavior during the meeting with the faculty and on the college's reasonable concern about the student's future conduct in a clinical setting working with patients. In its analysis, the OCR also reaffirmed that an institution's standards of student conduct could prohibit a student "from continuing in a program if the student's conduct endangers the health and safety of that individual or others or is so inappropriate that it interferes with others' opportunity to participate in the class or program."[46]

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43. 8 Nat'l Disability L. Rep. ¶ 31 (Off. Civ. Rts. 1995). The OCR is the administrative agency that enforces, administratively, Section 504. There is also a private right of action available under Section 504.

44. *Id.*

45. 11 Nat'l Disability L. Rep. ¶ 326 (Off. Civ. Rts. 1997).

46. *Id.*; *see also South Suburban College*, 13 Nat'l Disability L. Rep.

Even where a student has not engaged in threatening or disruptive behavior, a school need not ignore violations of school policy merely because the student may have a mental disability that caused the misbehavior.[47] Rather, the institution may impose appropriate discipline upon a disabled student who has violated school policy provided the school treats similarly-situated nondisabled students in a consistent manner.

For example, in one 1998 decision, the OCR held that the University of Idaho did not discriminate against a learning-disabled law student on the basis of his disability when it dismissed the student from the law school for dishonesty for failing to disclose his prior criminal record on his initial application form.[48] Rather, the evidence indicated that the disciplinary action imposed on the student as a result of his dishonesty was consistent with actions imposed upon similarly-situated nondisabled students.[49]

Although the above cases illustrate situations in which colleges and universities properly dismissed students with mental disabilities for egregious or threatening behavior, caused by manifestations of the mental disability or for behavior that otherwise violated the school's code of conduct, these same cases also point out the importance of establishing disciplinary standards and

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¶ 94 (Off. Civ. Rts. 1998) (rejecting a student's "perceived disability" claim and holding that the college did not violate federal disability laws when it suspended the student for violating the college's student code of conduct by engaging in several altercations with staff, in which she used inappropriate language and in which the police were involved).

47. Importantly, although schools must consider the effect of a student's disability on the student's actions, the law does not require a school simply to waive its requirements under, for example, the Honor Code to accommodate the student. *See Childress v. Clement*, 5 F. Supp. 2d 384, 391 (E.D. Va. 1998) (suggesting that such a requirement would constitute an unreasonable accommodation).

48. *University of Idaho*, 13 Nat'l Disability L. Rep. ¶ 127 (Off. Civ. Rts. 1998).

49. *See id.*; *see also Morehouse Sch. of Med.*, 17 Nat'l Disability L. Rep. ¶ 94 (Off. Civ. Rts. 1999) (concluding that a medical school did not treat a student with bipolar disorder differently because of her disability where the school dismissed the student because she had violated the school's rules of conduct for students by falsifying documents and engaging in "inappropriate" outbursts in the school's Department of Human Resources). *Childress*, 5 F. Supp. 2d at 391-92 (upholding the dismissal of a learning disabled student who had engaged in cheating and plagiarism, stating that "the Honor Council properly concluded that, whether the result of a disability or not, Plaintiff had unacceptably violated the Honor Code in the past and could not, even with accommodation, fulfill the essential function of complying with the Code in the future").

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adhering to those standards in deciding on dismissal as a solution. In particular, the OCR has emphasized that, prior to dismissing a student with a mental disability for failure to meet a college's or university's standards of conduct, campus administrators should provide the student with (i) reasonable notice of those standards, (ii) the basis for their belief that the student did not meet those standards, and (iii) a reasonable opportunity to modify the behavior or engage in counseling so that the student can comply with the school's reasonable standards of conduct.[50]

Failure to follow disciplinary procedures outlined in the school's code of conduct, to consider possible reasonable accommodations for a disabled student, or to consider the effects of the student's disability on her/his behavior prior to dismissing the student could lead to liability under the federal disability laws, even if the dismissal would have been proper had the school followed the proper procedures.

As already discussed, whether or not dismissal is proper depends on the facts surrounding each case. Administrators must exercise care not to allow the mere fact that a student may suffer from a mental illness guide its decision in every situation.[51]

Dismissals for Failure to Meet Academic Requirements

In recent years, much of the discussion regarding students with mental disabilities has focused on students with learning or other mental disabilities who are unable to successfully complete their academic programs, and who subsequently are dismissed. Courts and educational institutions have struggled over the degree to which these students should be accommodated, especially when the accommodation may substantially alter an institution's academic program or unacceptably lower core academic standards. Although, in many ways, the treatment of academic and disciplinary dismissals is similar,

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50. *See North Cent. Tech. College*, 11 Nat'l Disability L. Rep. ¶ 326 (Off. Civ. Rts. 1997).

51. *See, e.g., Doe*, 666 F.2d at 779 n.10 (cautioning that "[c]are must be exercised by schools...not to permit prior mental illness to be routinely regarded as a disqualification").

the appropriateness of dismissal is often less clear in cases involving academic failures.

The key issue upon which most cases involving academic dismissals turns is whether the student is "otherwise qualified" to remain a student at the institution. A student is "otherwise qualified" when s/he can meet the essential academic requirements of the school, with or without reasonable accommodation.[52] Although, in this regard, educational institutions must make reasonable modifications in their policies, practices, or procedures to avoid discrimination on the basis of disability, it is well-established that the law does *not* require schools to make modifications or accommodations that would fundamentally alter the nature of their services, programs, or activities.[53]

The line between reasonable and unreasonable accommodations is a fine one. What is reasonable in any given situation will depend on the individual facts and circumstances of each case. Therefore, as with disciplinary dismissals, administrators must analyze each student's situation on an individualized basis, keeping in mind that an accommodation that is considered unreasonable in one case may be perfectly reasonable in another.[54]

Several United States courts of appeals recently have had the opportunity to analyze the academic dismissals of students with mental disabilities under the ADA and Section 504. A review of these decisions may provide helpful guidance as to when such dismissals might be appropriate under these laws.

In one of the most recent cases, *Zukle v. Regents of the University of California*, the United States Court of Appeals for the Ninth Circuit upheld the university's dismissal of a learning disabled student from its medical school for failure to meet the school's academic standards. The Court found that the student's requested accommodations were unreasonable because

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52. *See, e.g., Zukle v. Regents of Univ. of Calif.*, 166 F.3d 1041, 1045 (9th Cir. 1999).

53. *See id.* at 1046; *see also Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

54. *See, e.g., Zukle*, 166 F.3d at 1048 (noting that reasonableness is not a constant); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 795 (1st Cir. 1992) (same).

they would require substantial modification of the school's academic program.[55] In *Zukle*, the student had experienced academic difficulty in her medical school courses from the beginning. During her second year of study, she was diagnosed with a reading disability that affected visual processing and that caused her to take longer than the average person to read and to absorb information.[56]

Upon learning of Zukle's disability, the school provided her with numerous accommodations, including double time on exams, notetaking services, and textbooks on audiocassettes. The school also allowed her to retake courses, proceed through the curriculum on a decelerated schedule, and to remain at the medical school although her performance rendered her subject to dismissal under the school's bylaws.[57] Even with these accommodations, however, Zukle was unable to achieve passing grades in her courses. Eventually, the school dismissed her pursuant to its bylaws for failure to meet its academic standards.

The court held that Zukle was not "otherwise qualified" to meet the school's academic requirements with or without reasonable accommodation. The court rejected Zukle's argument that the school should have provided her with additional accommodations such as: allowing her to interrupt two courses to begin other courses (and to complete the original courses at a later date); excusing her from the in-hospital portion of her clerkships to prepare for exams; and granting her eight weeks off before each of her clerkships to read. The court agreed with the school's conclusion that such accommodations would substantially alter the school's curriculum and lower the school's academic standards, which the school was not required to do to accommodate Zukle.[58]

Similarly, in *Kaltenberger v. Ohio College of Podiatric Medicine*,[59] the United States Court of Appeals for the Sixth Circuit rejected a claim by

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55. *Zukle*, 166 F.3d at 1048.

56. *See id.* at 1043.

57. *See id.* at 1048.

58. *See id.* at 1050-51.

59. 162 F.3d 432 (6th Cir. 1998).

a former podiatry student suffering from attention deficit-hyperactivity disorder that the school violated the ADA and Section 504 when it dismissed her for twice failing a biochemistry class. The student complained that the school refused to permit her to take an abbreviated remedial summer biochemistry course or to allow her to retake the exam after failing it the second time. In finding for the school, the court reemphasized that the laws do not require schools to make fundamental or substantial modifications to accommodate disabled students, and noted that the school had already provided the student with numerous accommodations, including allowing her to take her exams in a separate room and giving her extra time to complete them.[60]

The OCR also has applied similar considerations in the academic dismissal context. For example, in *Whittier College School of Law*,[61] the OCR upheld the dismissal of a dyslexic law student who had failed to achieve a passing grade point average. The school had provided the student with the only academic adjustment the student had requested (extra test-taking time), but the student still was unable to meet the school's minimum academic standards. Similarly, in *California State University, Sacramento*,[62] the OCR held that a university did not unlawfully discriminate against a learning-disabled student

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60. *See id.*; *see also McGuinness v. University of New Mexico Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (holding that a student's anxiety in chemistry and mathematics courses was not a disability under the ADA or Section 504 and stating that, even if he were disabled, the federal laws would not have required the university to waive the student's biochemistry course or grant him a passing grade where he had not demonstrated competency in the subject).

61. 4 Nat'l Disability L. Rep. ¶ 183 (Off. Civ. Rts. 1993). In reaching its decision, the OCR recognized that, in providing academic adjustments, a school "does not guarantee the academic success of a student, but rather commits itself to providing that student with whatever assistance is necessary to ensure that a student with disabilities has the same opportunity for academic success as any other student in the same program." *Id.*

62. 8 Nat'l Disability L. Rep. ¶ 372 (Off. Civ. Rts. 1996); *see also Morehouse Sch. of Med.* 17 Nat'l. Disability L. Rep. ¶ 94 (Off. Civ. Rts. 1999) (holding that the institution did not violate Section 504 by refusing to abbreviate the "on call" schedule of a medical student with bipolar disorder because that academic adjustment, if implemented, would not have adequately prepared the student for the next phase of her training (residency)); *Northern Illinois Univ.*, 7 Nat'l Disability L. Rep. ¶ 392 (Off. Civ. Rts. 1995) (finding no ADA or Section 504 violation where the school refused to accept a "D" grade in a math course as fulfillment of a core competency requirement because the school demonstrated that the successful completion of the math requirement was essential to its program of instruction and the school had provided the student with numerous accommodations, including extra test-taking time and tutoring).

when it denied her a one-year extension to complete graduate course work where the university asserted that such an accommodation would substantially alter the program of study.

Importantly, in academic dismissal cases, many courts often pay considerable deference to the educational institution's evaluation of its own academic standards. This deference stems from the court's limited ability to evaluate a student's academic performance or qualifications for a particular program as compared to the abilities of experienced educational professionals directly associated with the school.[63] Courts also will frequently defer to an institution's determination that no reasonable accommodation could have been made.[64] Thus, rather than make an independent determination of whether a reasonable accommodation was available, a court applying this deferential standard will evaluate whether the facts add up "to a professional, academic judgment that reasonable accommodation is not available."[65]

Courts, however, will accord such deference only where the school demonstrates that it carefully considered all pertinent and appropriate information in making its decision that a student cannot meet the school's academic requirements.[66] Thus, administrators should ensure that they document their efforts to make themselves aware of the nature of the student's disability, to explore alternatives for accommodating the student, and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to

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63. *See, e.g., Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978) (noting that "[c]ourts are particularly ill-equipped to evaluate academic performance"); *Zukle*, 166 F.3d at 1047 (agreeing that courts should extend judicial deference to an educational institution's academic decisions in ADA and Section 504 cases).

64. *See, e.g., Zukle*, 166 F.3d at 1048.

65. *See id.* (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 27-28 (1st Cir. 1991)). The OCR accords institutions similar deference. *See, e.g., Northern Ill. Univ.*, 7 Nat'l Disability L. Rep. ¶ 392 (Off. Civ. Rts. 1995) (noting that "OCR grants great deference to recipients to determine which academic requirements are essential to their programs of instruction"); *University of Tenn. at Martin*, 14 Nat'l Disability L. Rep. ¶ 72 (Off. Civ. Rts. 1998) ("[A]bsent evidence of a discriminatory intent, reasonable deference must be accorded to the academic decisions of educational institutions."); *Cabrillo College*, 2 Nat'l Disability L. Rep. ¶ 78 (Off. Civ. Rts. 1991).

66. The institution's academic standards also must be universal and not constructed merely for the purpose of excluding persons with disabilities or to disguise truly discriminatory requirements. *See, e.g., Zukle*, 166 F.3d at 1048.

complete the program without fundamentally or substantially modifying the school's standards.[67]

The importance of engaging in a careful, reasoned evaluation of each student's situation is illustrated by the decision of the United States Court of Appeals for the Ninth Circuit in *Wong v. Regents of the University of California*. *Wong* involved the dismissal for academic reasons of a medical student with a disability that affected the way he processed verbal information. The court refused to grant deference to the school's decision because the school failed to establish a record undisputedly showing that relevant school officials properly explored possible accommodations or considered all relevant factors in making its decision that the student could not meet its academic requirements, even with reasonable accommodation.[68]

In short, although the ADA and Section 504 clearly do not require educational institutions to make fundamental alterations to their academic standards to accommodate students with mental disabilities, institutions should take all the necessary steps to evaluate carefully each individual case before concluding that it is impossible for a disabled student to meet the institution's academic requirements.

THE INFLUENCE OF PRE-HIGHER EDUCATION PROTECTIONS ON THE EXPECTATIONS OF POSTSECONDARY STUDENTS

When dealing with students with disabilities, postsecondary administrators are often faced with unreasonable expectations of students and their parents arising largely from their experiences in the elementary and secondary school environments. Namely, students and parents often expect that the rights granted by the Individuals With Disabilities Education Act (the "IDEA")[69], are applicable in the postsecondary

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67. *See Wong v. Regents of Univ. of Calif.*, 192 F.3d 807, 817-18 (9th Cir. 1999).

68. *See id.* at *11-*12. *Compare Wong*, 192 F.3d at 825 (refusing to defer to school's judgment and allowing case to proceed to trial), *with Zukle*, 166 F.3d 1041 (applying deferential standard and finding for the university in a case involving similar facts and the same institution).

69. Pub. L. 101-476, Sec. 901, 104 Stat. 1103, 1142 (1990); 20 U.S.C. §§ 1400-1487 (1994).

setting. While the IDEA does not apply to, or otherwise govern, the higher education environment,[70] it is important nonetheless for college and university administrators and counsel to understand its basic provisions so that students' and parents' expectations may be addressed and objectively reassessed at the outset of the relationship.

Enacted in 1990, as an amendment to the Education for All Handicapped Children Act, the IDEA was designed to ensure that children with disabilities received a free and appropriate public education, and that their parents or guardians had the opportunity to participate meaningfully in the development and provision of their education.[71] Under the IDEA, states must establish procedures so that the learning experience of a child with a disability is as close as possible to the learning experience of a child without a disability.[72]

Based on either the request of a parent or a teacher's concern regarding a child's behavior or performance, the State educational agency, other state agency or the local education agency (collectively, the "Agency") must conduct, upon obtaining informed consent from a parent, a full evaluation of the child to determine whether the child has a disability and to determine the educational needs of the child.[73] A variety of assessment tools and strategies must be used to gather relevant functional and developmental information about the child.[74] The evaluation process must involve a team, consisting of the child's parent, at least one regular education teacher of the child, at least one special education teacher, a representative of the local school agency, an individual who can interpret the instructional implications of the evaluation results, the child (whenever appropriate), and, at the discretion of the Agency, other individuals who have knowledge or special expertise regarding the child (the "IEP Team").[75]

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70. *Id.* § 1401(8); 1412(6).

71. *See id.* § 1400(d).

72. *See id.* § 1412.

73. *Id.* § 1414(a); *see id.* § 1415(8)(B).

74. *Id.* § 1414(b)(2).

75. *Id.* § 1414(c)(1); (d)(1)(B).

Assuming the evaluation process results in a determination that the child has a disability, a copy of the evaluation report and the supporting documentation must be given to the parent, and the IEP Team must develop an "individualized education program" ("IEP") for the child.[76] The IEP is a written statement that includes, among other things, the child's present levels of educational performance, measurable annual goals and the child's progress in connection therewith, special education and related services and supplemental aids and services to be provided to the child, and an explanation of the extent to which the child will not participate with nondisabled children.[77] The IEP is reviewed at least annually and revised as necessary.[78]

Given the panoply of rights under the IDEA that are afforded children with disabilities in elementary and secondary school and their parents, it is not surprising that they often expect the same treatment at the college and university level. Accordingly, administrators and counsel in institutions of higher education should be sensitive to the fact that many students and their parents have no idea that the days of regularly scheduled disability evaluations, development and implementation of detailed IEPs by a team of specialists, placements in interim educational settings, and full fledged due process proceedings do not carry over into the higher education environment.

76. *Id.* § 1414(b)(4)(B); (d)(2).

77. *Id.* § 1414 (d)(1)(A).

78. *Id.* § 1414(d)(3)(B).

COMMONLY-ASKED QUESTIONS

Bringing together the various concepts and principles discussed in this pamphlet, the following section includes some of the more commonly-asked questions and a few answers regarding the dismissal of students with disabilities.

Q: In general, what are the obligations of a college or university under Section 504 of the Rehabilitation Act of 1973 and Title III of the Americans With Disabilities Act regarding students with mental disabilities, including learning disabilities?

A. These federal statutes prohibit a college or university from discriminating against an otherwise qualified student (or prospective student) because of his/her mental disability in connection with any of the programs, activities, services, and facilities of the institution. These statutes also require the college or university to make reasonable accommodations in order to render the school's programs, activities, services and facilities accessible to qualified persons with mental disabilities unless such accommodations would impose an undue burden on the institution.

Q: Are there some types of mental conditions that are not covered by these statutes?

A: Yes. Certain conditions are expressly excluded from the definition of disability under federal law. These include compulsive gambling, kleptomania, pyromania, transvestitism, transsexuals, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical conditions, other sexual behavior disorders, and psychoactive substance use disorders resulting from the current illegal use of drugs. Certain other conditions would not be covered because they are *behaviors* rather than true mental *impairments*. For example, the definition of mental impairment does not include personality traits, such as poor judgment or a quick temper where there are not symptoms of a mental or psychological disorder. Further, individual learning types, learning differences, or academic problems, in and of themselves, do not constitute

covered disabilities under these statutes. And finally, the definition does not include current usage of drugs or alcohol, as opposed to an existing addiction.

Q: May the school request medical certification/verification of a student's alleged mental disability and the functional limitations resulting from the disability?

A: Yes. A college or university may require the student (at the student's expense) to provide reasonable documentation that the student has a disability and the functional limitations resulting from that disability.

Q: Is a college or university required to lower or even waive academic requirements so that a learning disabled student does not flunk out?

A: Assuming the institution can articulate why the academic standard or course requirement is essential to the program in question, the government and the courts generally have acknowledged that it would constitute an undue burden to require a college or university to make fundamental alterations in its education programs or to compromise the academic integrity of those education programs. Thus, for example, a college or university should not be required to waive a required course or series of courses that a learning disabled student is unable to complete if those courses are essential to the program of instruction being pursued.

Q: A student repeatedly fails college algebra, a required course that all students must pass before advancing beyond sophomore year. The student produces a doctor's note attributing his problems with algebra to a learning disability. May the school dismiss the student for academic reasons for failure to satisfy the algebra requirement?

A: Assuming the institution has reviewed the requirement and can articulate why algebra is essential for that institution and/or program, then the answer should be yes. However, the school should engage in a careful, reasoned evaluation of each student's individual circum-

stances to determine whether there are accommodations that could be made to enable the student to pass the algebra course (e.g. tutoring, extra time for tests and assignments, etc.).

Q: A student has been repeatedly disruptive in the classroom. After receiving a final warning about misbehavior, the student produces a doctor's note attributing his conduct to a psychiatric disability. The student again disrupts the classroom environment. Can he be dismissed from school?

A: Student misbehavior can be (and should be) dealt with by means of the institution's regular discipline processes, pursuant to the Student Code of Conduct. The institution's focus should be strictly on the student's behavior. If the student asserts that his behavior is the result of a psychiatric disability, it does not mean the institution must tolerate the bad behavior. Even if the student cannot control his or her behavior due to a disability, the student should be required to meet the behavioral standards applicable to the student body in general. It would be an undue burden on the college or university to expect it to lower its standards and tolerate the misbehavior.

Q: Should a college or university adopt a written policy dealing specifically with handling students exhibiting apparent psychiatric problems, including procedures for granting withdrawals for psychiatric reasons?

A: No. A college or university should have policies that address how it handles inappropriate student behavior generally. The institution should not "diagnose" or assume that the reason for the misbehavior is due to a psychiatric problem without the student declaring that he/she has such a disability. As stated above, the institution's focus should be on the student's behavior. If the student does state that the inappropriate behavior is due to a disability, then the school should rely on its policy outlining how to handle requests for accommodation based on a disability; however, as mentioned above, institutions need not compromise their behavioral standards in making this accommodation. If a student asks for a leave of absence or a withdrawal

as an accommodation, the school should already have a policy dealing with medical leaves and withdrawals that is applicable to all students, not just to those with covered disabilities.

Q: What about conditioning readmission to school on a requirement that the student with a psychiatric disability take prescribed medication?

A: Generally, a college or university should not require a student to have to take his or her prescribed medication as a requirement for re-admission. If an institution wants to utilize a form of "re-admission" or "last chance" agreement for students who were suspended or dismissed for misconduct, the process ought to be predicated more on ensuring appropriate behavior for all students. Whether the misconduct was caused by a psychiatric impairment or just bad behavior should not be the focus of the school's concern. Likewise, if a student misuses or fails to use prescribed medication, or if the prescribed medication does not have the desired effect on behavior, the school should not be responsible for making that assessment. Instead, the policy should address the behavior and the curtailment of that behavior as a condition of re-admission, as well as any sanctions for failure to comply with those conditions. As discussed above, tolerating bad behavior should not be a mandated accommodation.

Q: What are examples of some commonly-made mistakes in managing dismissal situations involving students with mental disabilities?

A: Some commonly-made mistakes include:

- assuming that every claimed "disability" is a covered disability under the ADA or Section 504;
- not trying to determine how the functional limitations resulting from the disability relate to the student's deficiencies, either behavioral or academic;
- trying to play amateur psychiatrist or psychologist instead of focusing on the student's behavior;

- making statements that could lead the student or the OCR to believe that administrators took disciplinary action against the student because they perceived the student as having a mental disability instead of focusing on the student's misbehavior; and
- failing to consider options or alternatives to the outcome requested by the student, his/her parents or the student's advocate.

Q: Is there a "one size fits all" formula for dealing with students with apparent mental disorders?

A: No. Situations involving students with mental disabilities must be evaluated and handled on an individualized case-by-case basis. The functional limitations resulting from a particular disorder will inevitably vary from student-to-student, even if the medical diagnosis is the same. Likewise, the surrounding circumstances of each situation will inevitably vary. In order to manage these types of issues, college and university administrators should have an understanding of all of the concepts and principles discussed in this pamphlet, and be able to apply those concepts and principles on a case-by-case basis.

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